In the Matter of the Compensation of
**MICHELLE L. KNOWLDEN, Claimant**
WCB Case No. 22-03156
ORDER ON REVIEW
Guinn Law Team, Claimant Attorneys
Wallace Klor Mann Capener, Defense Attorneys

Reviewing Panel: Members Ceja and Curey. Member Ceja concurs.

Claimant requests review of Administrative Law Judge (ALJ) Krametbauer's order that affirmed a Workers' Compensation Division (WCD) order that denied her request for a Worker Requested Medical Examination (WRME). On review, the issue is WRME entitlement.[1] We affirm.

## FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."[2]

## CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that claimant was not entitled to a WRME because claimant had not met all of the requirements of ORS 656.325(1). Accordingly, the ALJ affirmed the WCD's order.

On review, claimant contends that she is entitled to a WRME. For the following reasons, we affirm the ALJ's order.

[1] In its respondent's brief, the self-insured employer requests sanctions for a frivolous appeal under ORS 656.390(1). However, we are not persuaded by the employer's contention. In determining whether a request for review is frivolous, the question is whether a reasonable lawyer would know that the argument is not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law. *See SAIF v. Azzor*, 182 Or App 90, 96 (2002); *Jack L. Edwards*, 71 Van Natta 506, 506 n 1 (2019). Here, it is undeniable that the COVID-19 pandemic created unforeseeable consequences concerning the administration of workers' compensation claims. Thus, under these circumstances, we consider claimant's contentions to be reasonable, albeit unsuccessful, arguments for the extension, modification, or reversal of existing law. Consequently, ORS 656.390(1) sanctions are not warranted.

[2] We supplement the ALJ's findings to include that the December 18, 2020, denial stated that it was based in whole or in part on an IME. (Ex. 25).

ORS 656.325(1)(e)[3] and OAR 436-060-0147(1)[4] provide that a worker may request an examination by a physician selected by the WCD when they make a timely request for hearing on a denial that is based on an IME with which their attending physician (or other authorized medical provider under ORS 656.245) did not concur. The Board has interpreted these criteria to require that the subject denial is *in fact* based on an in-person examination requested pursuant to ORS 656.325(1)(a). *See Lorinda A. Gauthier*, 70 Van Natta 96, 98 (2018) (so stating); *Denise Amos*, 65 Van Natta 2100, 2102 (2013) (physician's "record review" did not constitute "an examination" for purposes of ORS 656.325(1)(a) and (e)). Further, the Board has held that the statutory and administrative requirements must be satisfied at the time of the claimant's WRME authorization request. *See Julie A. Dellinger*, 72 Van Natta 35, 36 (2020) (the claimant was not eligible for a WRME when the carrier's denial was not based on an IME at the time of the claimant's WRME authorization request).

Here, the record does not establish that the compensability denials were based on an in-person examination pursuant to ORS 656.325(1)(a). *See* ORS 656.325(1)(a), (e); OAR 436-060-0147(1)(b). We reason as follows.

Specifically, on August 2, November 4, and December 18, 2020, the employer issued denials of new or omitted medical condition claims related to claimant's December 2019 work injury. (Exs. 15, 16, 21, 25). Claimant timely

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[3] ORS 656.325(1)(e) provides that:

"If the worker has made a timely request for a hearing on a denial of compensability as required by ORS 656.319(1)(a) that is based on one or more reports of examinations conducted pursuant to paragraph (a) of this subsection and the worker's attending physician or nurse practitioner does not concur with the report or reports, the worker may request an examination to be conducted by a physician selected by the director from the list described in ORS 656.328.

[4] OAR 436-060-0147(1) provides:

"The worker is eligible for a worker requested medical examination if:

"(a) The worker has made a timely request for a Workers' Compensation Board hearing on a denial of compensability;

"(b) The denial is based on one or more independent medical examination reports; and

"(c) The attending physician or authorized nurse practitioner does not concur with the report or reports."

appealed the employer's denials. (Exs. 15, 16, 21, 24, 27). Additionally, on November 30, 2020, claimant requested a hearing concerning an alleged *de facto* denial of a right ankle injury claim and aggravation claim for claimant's low back injury. (Ex. 23). Therefore, claimant has established that she made timely requests for hearing on denials of compensability.[5] ORS 656.325(1)(e); OAR 436-060-0147(1)(a).

The August 2, November 4, and December 18, 2020, denials were preceded by a March 30, 2020, report from Dr. Bremner, an orthopedic surgeon who performed a record review at the employer's request. They were also preceded by records of Dr. Smith, claimant's treating medical provider. The November 4, 2020, denial stated that it was based in part on the expert opinions of "Drs. Bremner and Smith." (Ex. 4). Additionally, the December 18, 2020, denial was preceded by a December 11, 2020, report from Dr. Morgan, a radiologist who performed a record review of the diagnostic imaging at the employer's request. (Ex. 6).

First, the medical reports written by Drs. Bremner and Morgan did not include an in-person examination. Instead, Drs. Bremner and Morgan performed record reviews based solely on the provided medical records and diagnostic imaging. (Exs. 4, 6). Thus, in the absence of in-person examinations by Drs. Bremner and Morgan, claimant is unable to establish entitlement to a WRME under ORS 656.325(1). *See Amos*, 65 Van Natta at 2104.

Moreover, the record establishes that Dr. Smith was a treating medical provider and did not conduct an IME pursuant to ORS 656.325(1)(a). (Exs. 2-3, 4-4-5, 7-2, 5-7, 17-1). Under such circumstances, the August 2, November 4, and December 18, 2020, denials were not based on an in-person IME and, therefore, claimant is not entitled to a WRME for this compensability denial.

[5] The ALJ also concluded that, although the employer issued an additional denial of further new or omitted medical condition claims on February 14, 2022, that denial was outside the scope of claimant's WRME request. (Ex. 27B). On review, claimant does not assert entitlement to a WRME based on the February 14, 2022, denial. Therefore, our order only addresses claimant's entitlement to a WRME with respect to the abovementioned 2020 denials.

At the hearing level, the employer objected to claimant's submission of additional exhibits concerning the February 14, 2022, denial. The employer does not renew those objections on review. Under such circumstances, we decline to address the evidentiary issue.

In so concluding, we acknowledge that the August 2 and December 18, 2020, denials state that they were "based in whole or part on an independent medical examination." (Ex. 15, 16). However, claimant's entitlement to a WRME depends on whether the denials were, in fact, based on IME's obtained pursuant to ORS 656.325(1)(a), regardless of the language used in the denial. *See Gauthier*, 70 Van Natta at 100 (declining to apply the holding of *Tattoo v. Barrett Bus. Serv.*, 118 Or App 348 (1993), to language used in a denial when analyzing the claimant's entitlement to a WRME). Thus, although the language used in the abovementioned denials refers to an "IME," the record does not establish that they were in fact based on IME's within the meaning of ORS 656.325(1).

Additionally, we acknowledge that Dr. Buehler conducted a post-denial IME on November 10, 2021. However, the Board has concluded that a denial is not "based on" an IME when the IME is conducted post-denial. (*See* Exs. 7, 15, 16, 21, 25); s*ee Dellinger*, 72 Van Natta at 36 (statutory prerequisite for a WRME is not established by "post-denial" IME).

Finally, we acknowledge claimant's observation that she was originally scheduled for an in-person examination with Dr. Bremner, but that the examination was cancelled as a consequence of the COVID-19 pandemic. Citing ORS 656.012(2)(a)-(b),[6] she contends that the exceptional circumstances surrounding the pandemic establish that a WRME should be granted. Nevertheless, ORS 656.325(1)(e) requires an in-person examination. *See Amos*, 65 Van Natta at 2103.

Thus, under these particular circumstances, the statutory prerequisite that a compensability denial be based on an IME has not been met. ORS 656.325(1)(e); OAR 436-060-0147(1)(b). Therefore, claimant has not established entitlement to a WRME.[7]

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[6] ORS 656.012(2)(a)-(b) provides that the objectives of the Oregon Workers' Compensation Law are:

> "(a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents;
>
> "(b) To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable, while providing for access to adequate representation for injured workers[.]"

[7] Because we have concluded that the employer's denials were not based on an IME as required by ORS 656.325(1)(e), and that claimant is, therefore, not entitled to a WRME, it is unnecessary for us to address the additional requirement concerning whether her attending physician disagreed with any of the IME reports.

ORDER

The ALJ's order dated March 1, 2023, is affirmed.

Entered at Salem, Oregon on September 20, 2023

Member Ceja, concurring.

Based on the principles of *stare decisis*, and the lead opinion's application of *Julie A. Dellinger*, 72 Van Natta 35 (2020), *Lorinda A. Gauthier*, 70 Van Natta 96 (2018), and *Denise Amos*, 65 Van Natta 2100 (2013), I agree that claimant has not established her entitlement to a WRME under these particular circumstances.

In *Thomas S. Cardoza*, 73 Van Natta 561, 567 (2021), and *Kevin J. Siegrist*, 72 Van Natta 491, 497 (2020), Member Ousey wrote separately to address his concerns with the impact of our case law regarding the availability of WRMEs. The instant case provides further illustration of the combined effect of our case law in limiting various aspects of a claimant's entitlement to a WRME, and ultimately significantly limiting access to the WRME remedy for injured workers. Because I share Member Ousey's concerns about addressing the financial disparity between carriers and injured workers, and the potential for expansion of WRME eligibility to address that disparity, I offer this concurring opinion.

Here, the employer has used its superior financial resources and relied on record reviews from an orthopedic surgeon and a radiologist to develop the medical record. (Exs. 4, 6). Yet, because the Board concluded in *Amos* that WRMEs are available only in response to an insurer-requested in-person examination, claimant was left to rely solely on her own resources to develop the record in response to the employer's use of record reviews from multiple physicians. 65 Van Natta at 2104.

*Amos* has a significant impact on the ability of claimants to develop the medical record where carriers utilize a physician's "record review," in lieu of an in-person examination. *Id*. Although ORS 656.325(1)(e) is focused on providing the worker an "examination" when the carrier has obtained an IME, it is unclear why the same concerns regarding the claimant's ability to develop the medical record do not extend to the use of a "record review," where the carrier employs a medical expert to perform an exhaustive forensic analysis of the medical record. Such a review would typically be beyond a treating physician's capacity to

perform. Indeed, our method for analyzing the persuasiveness of the medical opinions, concerning their completeness, accuracy, and the cogency of their analysis tends to disadvantage the opinions of treating physicians who are more engaged in providing treatment to patients than analyzing and explaining medical-legal questions. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Daniel J. Wilson*, 62 Van Natta 381, 385 (2010) (the logical force of an opinion involves the depth, clarity, and cogency of analysis). As noted by Member Ousey in his *Siegrist* concurrence, amending ORS 656.325(1) to allow claimants to obtain a comparable "record review" is an important step toward ameliorating the disparities between carriers and claimant's during the litigation process. 72 Van Natta at 499.

In addition to the two physician record reviews, the employer also utilized a post-denial, in-person IME. (Ex. 7). However, because of the Board's interpretation of ORS 656.325(1)(e) in *Dellinger*, claimant was not entitled to obtain a WRME in response to the third medical expert that the employer utilized in this case. 72 Van Natta at 36.

The Board's opinion in *Dellinger* limited the scope of a claimant's WRME eligibility to specific circumstances where the carrier has obtained an IME report before issuing its denial of a claim. *See id.* Thus, a carrier has a significant degree of flexibility to obtain medical opinions after issuing its denial, without the claimant having a commensurate ability to utilize the WRME process in response. In its reasoning that post-denial IME's cannot entitle the claimant to a WRME, *Dellinger* relies on a distinction between a denial being "based on" an IME and the carrier relying on an IME to support its denial during litigation. Although the distinction highlights different stages of the litigation process, the distinction does not appear to serve an equitable purpose concerning the development of medical records in disputed workers' compensation claims.

Thus, I would urge the legislature and MLAC to support laws and rules that expand claimants' access to the WRME process in response to carrier-arranged physician record reviews and post-denial IME's. Nevertheless, notwithstanding my significant concerns with the limited scope of the WRME process, and its contribution to the disadvantages faced by claimants in litigated workers' compensation cases, I concur with the outcome in this case.